

ORIGINAL

OPEN MEETING AGENDA ITEM



0000147203

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

2013 AUG -8 A 11:05

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

AUG - 8 2013

DOCKETED BY nr

IN THE MATTER OF THE FORMAL
COMPLAINT OF SWING FIRST GOLF LLC
AGAINST JOHNSON UTILITIES LLC

DOCKET NO. WS-02987A-13-0053

**EXCEPTIONS OF SWING FIRST
GOLF LLC**

1 Swing First Golf LLC ("Swing First") hereby takes exception to the July 30, 2013,
2 Recommended Opinion and Order ("ROO") in the above-captioned docket. The ROO relies on
3 the doctrine of *res judicata* to dismiss counts A and B of Swing First's complaint against
4 Johnson Utilities LLC ("Utility"). However, the *res judicata* doctrine only bars "subsequent
5 claims [that] arise out of the same nucleus of facts." *Howell v. Hodap* 221 Ariz. 543, 547; 212
6 P.3d 881, 885 (Ariz.App. Div. 1, 2009). To be treated as arising out of the same nucleus of
7 facts, the claims must be related in time and space. *In re General Adjudication of All Rights to*
8 *Use Water In Gila River System and Source*, 212 Ariz. 64, 71; 127 P.3d 882, 889 (Ariz. 2006).
9 Swing First's initial complaint concerned Utility's effluent deliveries and minimum bill charges
10 from **2004 through 2007**. Swing First's current complaint concerns effluent deliveries and
11 minimum bill charges in **2012 and 2013**. The relevant nucleus of facts is separated by over five
12 years and is therefore unrelated in time and space. *Res judicata* does not apply.

13 In addition to being contrary to Arizona law, the ROO would also set poor public policy.
14 It would allow a monopoly utility to misbehave with impunity after a similar previous complaint
15 was voluntarily dismissed with prejudice. The Commission has encouraged parties to resolve
16 disputes in a manner that results in a complaint being dismissed with prejudice. However, a

complainant would never agree to dismiss a complaint if the dismissal provided the utility with a license to resume the same behavior that had caused the original complaint.

As further discussed below, the Commission should reject the ROO and allow Swing First to conduct discovery and otherwise present its case. Exhibit A is a suggested Amendment for the Commission's consideration.

DISCUSSION

I Res Judicata Does Not Apply

A Res Judicata Does Not Bar Subsequent Claims Based on a Separate Nucleus of Operative Facts

Res judicata is more modernly known as “claim preclusion.” *In re General Adjudication of All Rights to Use Water In Gila River System and Source*, 212 Ariz. 64, 69; 127 P.3d 882, 887 (Ariz. 2006).¹ For claim preclusion to apply, the claims must be “related in time, space, origin, or motivation” *Id.* 212 Ariz. at 71; 127 P.3d at 889 (quoting Restatement of Torts (2d) § 24(2), cmt. B), (emphasis added). The claims must be based on a “common nucleus of operative facts.” *Id.*

A subsequent Arizona case confirmed that *res judicata* only bars “subsequent claims [that] arise out of the same nucleus of facts.” *Howell v. Hodap*, 221 Ariz. 543, 547; 212 P.3d 881, 885 (Ariz.App. Div. 1, 2009). Put another way, “the relevant inquiry is whether [the new claim] could have been brought” in the prior action. *Id.*, quoting *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998). “The determinative test asks whether the claims in each case depend upon the same essential facts for their proof.” *Bill By and Through Bill v. Gossett*, 132 Ariz. 518, 647 P.2d 649 (Ariz.App., 1982).

Here each nucleus of facts is separated by over five years. They are unrelated in time, space or origin. In January 2008, Utility had been deliberately withholding Effluent deliveries for more than a year. Utility was instead delivering more expensive CAP Water and often charging five times the lawful rate. The 2008 Complaint only concerned the pricing of irrigation

¹ In the *Gila River System* case, the Arizona Supreme Court applied federal law, but its reasoning is consistent with prior and subsequent Arizona precedent.

1 deliveries from 2005 through 2007. Utility mispriced these deliveries, charging five times the
2 lawful rate for much of the water that it did deliver.

3 The 2008 Complaint also concerned minimum bill overcharges from 2004-2007. During
4 that time period, Utility was charging in many months a minimum bill based on a six-inch meter,
5 even though the actual installed meter was a three-inch meter.² The 2008 Complaint only
6 concerned these overcharges, which have now been resolved to Swing First's satisfaction by the
7 Court action.

8 The 2013 Complaint raises an entirely different issue with minimum bills. In January
9 2008, in what may have been an attempt to cover up its mistakes, Utility came onto the golf
10 course without notice and replaced the three-inch meter with an eight-inch meter. For many
11 years, Utility then charged Swing First a minimum bill based on a four-inch or a six-inch meter.
12 Swing First did not think this was fair, but did not object and paid all bills including the
13 minimum bill. However, only recently Utility began charging Swing First a minimum bill based
14 on an eight-inch meter. Count B of the 2013 Complaint therefore asks the Commission to
15 prospectively "Order Utility to charge a minimum bill for Swing First's Effluent deliveries based
16 on a 3-inch water meter." Again, this is a separate nucleus of facts.

17 Because Utility's Court Complaint was moving forward at a rapid place, Swing First
18 voluntarily dismissed the 2008 Complaint with prejudice. It is also important to note that
19 hearing were never even scheduled, let alone held, concerning the 2008 Complaint. In fact,
20 Utility never even filed testimony.

21 Based on these facts, *res judicata* (claim preclusion) does not apply. The 2008
22 Complaint only concerned Utility's misdeeds from 2004-2008. The present Complaint concerns
23 Utility's misdeeds from 2012 through the present. In 2008, Swing First obviously could not
24 complain about Utility's misdeeds five years in the future. Nor, did any of the discovery or
25 motion practice in the 2008 Complaint involve any of the facts alleged in the 2013 complaint.

² The 2008 Complaint also raised other issues such as the propriety of tax charges, which have not been raised in the 2013 Complaint.

1 Finally, the 2008 Complaint was dismissed in 2012 after years of inactivity in the docket, well
2 before the misdeeds that caused Swing First to file the 2013 Complaint.

3 **B Res judicata Does Not Shield Repeat Offenders**

4 A couple of examples may be helpful. In 2008, a woman is forced to go to court to get
5 damages because her neighbor cut down a tree located on her property. She is awarded \$10,000
6 in damages. Then in 2013, the neighbor cuts down another tree. She must sue again. The
7 misbehaving neighbor cannot argue that *res judicata* shields him from her 2013 lawsuit. The
8 two misdeeds involve entirely different nuclei of facts.

9 Another example: A landlord may have to sue to force a tenant to pay rent. Assuming the
10 suit is successful, *res judicata* does not bar a second suit for a second failure to pay the rent.

11 Utility is a repeat offender, so *res judicata* does not bar the Complaint. Swing First was
12 forced to file the 2008 Complaint because of Utility's misdeeds from 2004 through 2007. Those
13 issues have now been resolved to Swing First's satisfaction. Unfortunately, Utility began
14 committing new misdeeds in 2012 and 2013. These are the subject of the present Complaint.
15 Specifically, Swing First asks the Commission to "Order Utility to deliver Effluent in quantities
16 sufficient to satisfy Swing First's irrigation needs for its Johnson Ranch Golf Course." This part
17 of the Complaint is based entirely on recent actions by Utility. Utility's 2012 and 2013 Effluent
18 deliveries into the 18th hole lake have been insufficient to maintain lake levels and to allow
19 Swing First to irrigate its golf courses during periods of high demands, such as in the hot summer
20 months and fall over-seeding.

21 **II Collateral Estoppel Also Does Not Bar Swing First's Complaint**

22 It is possible that the ROO confused *res judicata* with collateral estoppel ("claim
23 preclusion" with "issue preclusion"). The ROO lists similar-sounding issues in both complaints
24 before concluding that *res judicata* bars the "same claims." ROO at 18:9-11. However,
25 collateral estoppel also does cannot bar Swing First's claims.

26 Collateral estoppel only concerns legal issues that were actually resolved by the tribunal.
27 "[T]he judgment in the first action precludes relitigation of only those issues actually and

1 necessarily litigated and determined in the first suit.” *Nelson v. QHG of South Carolina Inc.*, 354
2 S.C. 290, 305; 580 S.E.2d 171 (S.C. App., 2003), quoting *Beall v. Doe*, 281 S.C. 363, 369 n. 1;
3 315 S.E.2d 186, 190, n. 1 (S. C. App., 1984).

4 Concerning the 2008 Complaint, no legal issues were actually litigated and the
5 Commission made no determinations concerning any legal issues. Therefore, collateral estoppel
6 also cannot apply.


7 [I]ssue preclusion (formerly referred to as collateral estoppel) “attaches only when
8 an issue of fact or law is actually litigated and determined by a valid and final
9 judgment, and the determination is essential to the judgment. In the case of a
10 judgment entered by confession, consent, or default, none of the issues is actually
11 litigated.”

12 212 Ariz. at 70; 127 P.3d at 888 (quoting *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct.
13 2304, 147 L.Ed.2d 374 (2000)).

14 **REQUESTED RELIEF**

15 Swing First asks the Commission to reject the ROO and allow Swing First the
16 opportunity to pursue its 2012 and 2013 claims against Utility. Exhibit A is a proposed
17 amendment to this effect.

18 RESPECTFULLY SUBMITTED on August 8, 2013.

19
20
21
22
23
24
25
26
27
28
29
30

Craig A. Marks
Craig A. Marks, PLC
10645 N. Tatum Blvd., Ste. 200-676
Phoenix, Arizona 85028
(480) 367-1956 (Direct)
(480) 304-4821 (Fax)
Craig.Marks@azbar.org
Attorney for Swing First Golf LLC

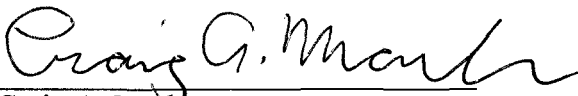
1 Original and 13 copies **filed**
2 on August 8, 2013, with:

3
4 Docket Control
5 Arizona Corporation Commission
6 1200 West Washington
7 Phoenix, Arizona 85007
8

9 Copy **e-mailed and mailed**
10 on August 8, 2013 to:

11
12 Jeffery W. Crockett
13 Brownstein Hyatt Farber Schreck
14 One East Washington Street
15 Suite 2400
16 Phoenix, AZ 85004
17

18 Robin Mitchell
19 Attorney, Legal Division
20 Arizona Corporation Commission
21 1200 West Washington
22 Phoenix, Arizona 85007
23

24
25 By: 
26 Craig A. Marks
27

DOCKET NO. WS-02987A-13-0053
SUGGESTED AMENDMENT
TO RECOMMENDED OPINION AND ORDER

Page 17, Line 6,

DELETE paragraphs 58 – 63 and replace with the following paragraphs:

Johnson's MTD is misplaced concerning Counts "A" and "B". *Res judicata* does not bar subsequent claims based on a separate nucleus of operative facts.

Res judicata is more modernly known as "claim preclusion." *In re General Adjudication of All Rights to Use Water In Gila River System and Source*, 212 Ariz. 64, 69; 127 P.3d 882, 887 (Ariz. 2006).³ For claim preclusion to apply, the claims must be "related in time, space, origin, or motivation ..." *Id.* 212 Ariz. at 71; 127 P.3d at 889 (quoting Restatement of Torts (2d) § 24(2), cmt. B), (emphasis added). The claims must be based on a "common nucleus of operative facts." *Id.*

A subsequent Arizona case confirmed that *res judicata* only bars "subsequent claims [that] arise out of the same nucleus of facts." *Howell v. Hodap*, 221 Ariz. 543, 547; 212 P.3d 881, 885 (Ariz.App. Div. 1, 2009). Put another way, "the relevant inquiry is whether [the new claim] could have been brought" in the prior action. *Id.*, quoting *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998). "The determinative test asks whether the claims in each case depend upon the same essential facts for their proof." *Bill By and Through Bill v. Gossett*, 132 Ariz. 518, 647 P.2d 649 (Ariz.App., 1982) (emphasis added).

Here each nucleus of facts is separated by over five years. They are unrelated in time, space or origin. Swing First could not have brought the new claims as part of the 2008 Complaint. The 2008 Complaint only concerned effluent deliveries from 2005 through 2007. The 2013 Complaint concerns effluent deliveries in 2012 and 2013. There has been no discovery or testimony concerning these deliveries. The 2008 Complaint only concerned minimum bill overcharges from 2004-2007. The 2013 Complaint concerns minimum bills from 2012 to the present and again there has been no discovery or testimony concerning these minimum bills.

³ In the *Gila River System* case, the Arizona Supreme Court applied federal law, but its reasoning is consistent with prior Arizona precedent.

Based on these facts, *res judicata* (claim preclusion) does not apply. There is no common nucleus of facts. The 2008 Complaint concerned facts from 2004-2008. The present Complaint concerns facts from 2012 through the present, after the 2008 Complaint was dismissed. These are clearly separate nuclei of facts, unconnected in time and space.

Although Johnson did not raise the related doctrine of collateral estoppel (issue preclusion), the Commission also notes that collateral estoppel would not bar Counts A and B. Collateral estoppel only concerns legal issues that were actually resolved by the tribunal. “[T]he judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.” *Nelson v. QHG of South Carolina Inc.*, 354 S.C. 290, 305; 580 S.E.2d 171 (S.C. App., 2003), quoting *Beall v. Doe*, 281 S.C. 363, 369 n. 1; 315 S.E.2d 186, 190, n. 1 (S. C. App., 1984).

Concerning the 2008 Complaint, no legal issues were actually litigated and the Commission made no determinations concerning any legal issues. Therefore, collateral estoppel also cannot apply.

[I]ssue preclusion (formerly referred to as collateral estoppel) “attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.”

212 Ariz. at 70; 127 P.3d at 888 (quoting *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000)).

Page 20, Line 18,

DELETE paragraph 70 and replace with the following paragraph:

We have determined to conduct a hearing on Counts A and B of Swing First’s 2013 Complaint. However, we do not find that an OSC is needed at this time. We do expect Staff to review and monitor Johnson’s operations and to file an OSC at any time it believes the conditions under A.R.S. §§ 40-321(A), 40-334 or Article XV of the Arizona Constitution exist.

Page 21, line 14,

DELETE first ordering paragraph and replace with the following paragraph:

It is therefore ordered that Johnson Utilities LLC's Motion to Dismiss Counts "A" and "B" of Swing First Golf's Complaint is hereby denied.

Page 21, line 22,

DELETE Counts "C" and "D" and replace with all Counts.

Page 22

Delete first ordering paragraph

Make all other conforming changes